No. 03-1080

In the Supreme Court of the United States

STATE OF CONNECTICUT,

Petitioner,

v.

RUSSELL PEELER,

Respondent

On Petition for Writ of Certiorari
to the Connecticut Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Consistent with the Sixth Amendment right to counsel of choice in a criminal prosecution, may a state rebut the presumption in favor of a defendant's chosen counsel and have defense counsel disqualified merely by stating that it might call defense counsel as a witness, without indicating the substance of the anticipated testimony and showing that such testimony is necessary to the state's case?

2. If defense counsel of choice is erroneously disqualified based on the state's asserted need to call defense counsel as a witness, and the state does not in fact call or need defense counsel as a witness at the ensuing trial, may the state properly claim that the Sixth Amendment deprivation was harmless?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Russell Peeler respectfully requests that this Court deny the State of Connecticut's petition for writ of certiorari, seeking review of the Connecticut Supreme Court's decision in *State v. Peeler*, 265 Conn. 460, 828 A.2d 1216 (2003) (Pet. App. A-1 to A-35).

STATEMENT

The Connecticut Supreme Court opinion sets forth in detail the facts and procedural history regarding the two cases underlying this appeal. 265 Conn. at 463 *et seq.*, Pet. App. at A-5 *et. seq.* In summary, the respondent Russell Peeler hired experienced criminal defense lawyer Gary Mastronardi to represent him in a case concerning the attempted murder and murder of Rudolph Snead in Bridgeport, Connecticut. As the case neared trial, the prosecutor's office moved to disqualify Attorney Mastronardi on the ground that the state might call him as a witness—not regarding the original charges against Peeler, but because of a supposed connection of Attorney Mastronardi to the subsequent murder of Leroy Brown, a potential witness in the Snead case, and his mother Karen Clarke. Leroy and his mother had moved to an undisclosed address on Earl Avenue in Bridgeport after giving statements to the police soon after the attempted murder of Snead. In a separate capital felony case, the state charged Peeler with the murder of these individuals at the Earl Avenue address. The respondent's appeal from his convictions in the Clarke/Brown trial is pending in the Connecticut Supreme Court.

It is important to note that Attorney Mastronardi never sought to represent Russell Peeler in the new case. A special public defender was appointed to represent the defendant in the Clarke/Brown murder trial. Although the state moved to consolidate the Snead case with the Clarke/Brown case, the

motion was only granted after Attorney Mastronardi had been removed from the Snead case for which he was hired. Shortly thereafter, the cases were severed and went to trial separately. In the Snead case, after Attorney Mastronardi's removal, the trial court appointed a less-experienced special public defender to represent Peeler. The defendant was convicted on all counts and received a 105-year sentence of incarceration.

As the Connecticut Supreme Court opinion recounts, the state abandoned its original reason for needing Attorney Mastronardi as a witness. The state's original motion to disqualify him provided that "[i]t is expected that Attorney Mastronardi will be called as a witness in the [capital felony case] regarding any knowledge on his part regarding the address and location of Karen Clarke and Leroy Brown, Jr. Attorney Mastronardi has spoken to the press and to Judge Ronan regarding a [s]tate's [o]bjection to disclosure of the above [witnesses'] address and statements claiming that he or his client had knowledge of their address before the [s]tate's motion [for a protective order]." 265 Conn. at 465, Pet. App. at A-7.

At the hearing regarding the state's motion to disqualify defense counsel, Attorney Mastronardi advised the court that "Mr. Satti, who is the prosecutor who's handling [the capital felony] case, knows full well that I never had the Earl Avenue address. . . . And Mr. Satti's words to me in court one day were: In light of all this, aren't you glad that the state never gave you the Earl Avenue address? . . . . Now I don't understand why Mr. Benedict would get up and even suggest something like that in open court on the record when he knows that's not true. I never knew that these people lived on Earl Avenue until I read it in the newspaper and that is an established fact. That's not—Mr. Satti could be called as a witness to establish that. Do we disqualify the state's attorney's office in this case?" 265 Conn. at 465-66, Pet. App. at A-7.

The state then switched gears. State's Attorney Benedict argued: "So it's not so much evidence that the state would seek to offer as to the defendant's knowing where they live, but rather what is necessary and most relevant in the double homicide trial is the confirmation that Leroy Brown would indeed be a witness. That in fact is the focal point of the state's evidence as to motive in the double homicide. I'd submit that the argument that the December [1998] disclosure triggered the January [1999] murders is most compelling and that therefore Mr. Mastronardi's testimony in the trial of the double homicide will be most necessary and will not be uncontested." 265 Conn. at 466, Pet. App. at A-8.

In response, Attorney Mastronardi argued that his own testimony was not necessary to make the state's point before a jury that Leroy Brown was a potential witness, thereby furnishing a motive for his murder by Russell Peeler. Attorney Mastronardi argued that the disclosure of the Brown and Clarke statements to the defense in December, 1998 was a matter of public record. Moreover, at an earlier hearing on the state's motion for a protective order in October, 1998, Attorney Mastronardi had stated on the record that he and his client already knew the identity of the witnesses the state sought to protect, including Leroy Brown. 265 Conn. at 466-67, Pet. App. at A-8 to A-9.

At the disqualification hearing, State's Attorney Benedict conceded that "perhaps the state can develop the information it wants to develop through some other avenue. That may well be. I don't know that it is in fact true at this time. . . ." 265 Conn. at 467, Pet. App. at A-8.

Later, in an interview with a newspaper, Benedict suggested that the disclosure of the statements of Leroy Brown and his mother had not led to their deaths. According to the newspaper account, Benedict said: "One thing you've got to understand . . . everybody knew everybody. . . . [T]he defense

knew their identities even before coming to court." 265 Conn. at 467-68, Pet. App. at A-9. Indeed, at the Clarke/Brown murder trial, the state's theory of the case was not that Attorney Mastronardi had told his client the names of the witnesses and where to find them. Rather, the defendant already knew their identities, and through a chance encounter, discovered their new address on Earl Avenue. The state developed this evidence through relatives and acquaintances of the defendant, not Attorney Mastronardi.

Attorney Mastronardi was not called as a witness at the Snead trial, the subject of this appeal. Even at the second trial for which the defendant always had other counsel, Attorney Mastronardi's contribution as a witness was negligible. The petitioner called State's Attorney Satti to testify about the limited disclosure of the witness statements to Attorney Mastronardi. The state then called Attorney Mastronardi as a witness regarding the same disclosure order, but never questioned him about what, if anything, he in fact had done in connection with the statements. 265 Conn. at 468-69, Pet. App. at A-10 to A-11.

The Connecticut Supreme Court ruled: "We agree with the defendant that the record did not demonstrate that the state had met its burden of proving that Mastronardi's testimony was necessary. Accordingly, we conclude that the trial court improperly disqualified Mastronardi in violation of the defendant's right to counsel of his choice." 265 Conn. at 470, Pet. App. at A-11 to A-12 (footnotes omitted).

The Court elaborated on its conclusion that Mastronardi's testimony was not needed by the state: "First, because Brown was mentioned by name in both the arrest warrant affidavit and the second substitute information filed in court on January 20, 1998, it is undisputed that his identity as a potential witness and as a victim was known nearly one year before the murder. Second, the notice of service of

disclosure of December 23, 1998, filed by the state, constituted a public record that memorialized the release of all of the witnesses' statements to Mastronardi pursuant to the trial court's December 9, 1998 discovery order. Indeed, as Satti's testimony demonstrated, Mastronardi was not the sole source of the fact that statements had been disclosed to him. Accordingly, the state never provided the court with specific information that *only* Mastronardi could provide." 265 Conn. at 476, Pet. App. at A-18.

REASONS FOR DENYING THE PETITION

I. THE PETITIONER DID NOT CLAIM BELOW THAT THE STANDARD FOR CALLING DEFENSE COUNSEL AS A WITNESS WAS TOO HIGH. THE DECISION BELOW RESTED ON THE UNIQUE FACTS OF THIS CASE, NOT ON AN UNREASONABLY HIGH STANDARD INVOLVING A GENUINE CONFLICT OF AUTHORITY.

As acknowledged in both the majority and dissenting opinions below, the state's case did not rise or fall on the legal standard cited in the petition for certiorari. The one dissenting justice wrote: "I believe that, in the present case, the state has demonstrated 'that all other available sources of comparably probative evidence have been exhausted.' . . . Therefore, I will not quibble with the majority's assertion that the state must establish a compelling need for defense counsel's testimony." 265 Conn. at 485-86, Pet. App. at A-28.

The majority opinion confirms the fact-dependent nature of the ruling below: "The dissent's argument distills to its determination that, as the state asserts, the trial court reasonably could have found that the state had a compelling need to call Mastronardi as a witness . . . For all the reasons we have already enumerated, we simply disagree." 265 Conn. at 478 n. 11, Pet. App. at A-20 n. 11.

The petitioner did not urge the Connecticut Supreme Court to set a lower threshold for calling defense counsel as a witness. Rather, the state claimed that it had met the test for calling Attorney Mastronardi to the stand and therefore he had to be disqualified. There was no sharp disagreement on legal principle reflecting a serious conflict among the federal circuit or state supreme courts.

The petitioner lost below because it could not support its original suggestion that Attorney Mastronardi had given his client the Earl Avenue address where the boy and his mother were killed, not because of an unreasonably high standard for disqualifying defense counsel. The suggested scenario might have made Attorney Mastronardi an important witness for the state in the Brown/Clarke murder trial, but even then he could have remained as counsel of choice in the Snead trial. The petitioner's alternative basis for disqualifying Attorney Mastronardi, namely that only he could establish a motive for Peeler to have murdered Brown and Clarke by showing that Brown was to be a witness against Peeler, was similarly wide of the mark. As the Connecticut Supreme Court concluded, there were a variety of different ways to show the Brown/Clarke jury that Brown was a potential witness against the defendant. Attorney Mastronardi was not needed to make the state's case against Peeler in the Brown/Clarke trial, let alone the Snead trial.

Notwithstanding these dispositive factual matters, the state seeks to carry the battle to a higher forum on the back of the standard adopted by the Connecticut Supreme Court for allowing one party to call the other party's lawyer to the stand. This is a curious tack for the state to take, for in its brief below and at oral argument before the Connecticut Supreme Court, the petitioner urged the Court to apply *Ullmann v. State*, 230 Conn. 698, 647 A. 2d 324 (1994), to the facts of this case. In *Ullmann*, the Connecticut Supreme Court held that the state had demonstrated a sufficient need, based

on specific proposed questions and anticipated answers, to call the defendant's former public defender as a witness against him. The state argued that *Ullmann* was indistinguishable from the present case. A subsection of the state's brief before the Connecticut Supreme Court was entitled, "Why The Facts Of This Case Are The Same As *Ullmann*." Brief of the State of Connecticut-Appellee, at 15. Now, the state complains for the first time that the *Ullmann* standard was too high.

In the present case, the Connecticut Supreme Court summarized the rationale for its *Ullmann* standard as follows: "When either side in a criminal case seeks to call as a witness either a prosecutor or a defense attorney who is or has been professionally involved in the case, that party must demonstrate that the testimony is 'necessary and not merely relevant, and that all other available sources of comparably probative evidence have been exhausted.' . . . This 'compelling need' test strikes the appropriate balance between, on the one hand, the need for information and, on the other hand, the potential adverse effects on the attorney-client relationship and the judicial process in general." 265 Conn. at 460, Pet. App. at A-16 (quoting *Ullmann*, 230 Conn. at 717, 647 A.2d at 333).

Recognizing the potential for abuse in calling an opposing lawyer to the stand, the Connecticut Supreme Court endorsed the rule that "whenever an adversary declares his intent to call opposing counsel as a witness, prior to ordering disqualification of counsel, the court should determine whether counsel's testimony is, in fact, genuinely needed. *Connell v. Clairol, Inc.*, 440 F. Supp. 17, 18 n.1 (N.D.Ga. 1977)." 265 Conn. at 474, Pet. App. at A-15 to A-16.

This standard for calling defense counsel as a witness, whether denominated a "compelling need," "genuine need," or "necessary and not merely relevant" test, appropriately informed the Connecticut Supreme Court's determination of

whether Attorney Mastronardi had been properly disqualified at the state's behest, based on a suggested conflict of interest from the possibility of his serving as counsel and witness in the same trial. The Connecticut Supreme Court nevertheless recognized that under *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) and other cases, the right of a defendant to choose defense counsel is not absolute, but must yield when an actual conflict of interest or a "serious potential" for a conflict is shown. *Peeler*, 265 Conn. at 473-74, Pet. App. at A-14 to A-15.

Thus this case does not implicate any real split of authority. There was nothing exceptional or aberrant in the Connecticut Supreme Court's use of the standard at issue until the Court disagreed with the petitioner's view of the facts. The petitioner has identified no case reaching a different result where the facts are analogous to those here. In short, the petitioner has failed to show that this fact-based case, where the "compelling need" standard was not originally in dispute, merits a place on the Court's docket.

II. THIS COURT HAS ALREADY FURNISHED APPROPRIATE GUIDANCE TO THE LOWER COURTS ON THE SECONDARY ISSUE WHICH THE PETITIONER FAILED TO BRIEF BELOW. MOREOVER, APPLYING HARMLESS ERROR REVIEW TO ERRONEOUS DISQUALIFICATIONS OF COUNSEL OF CHOICE WOULD CREATE FURTHER INCENTIVES FOR THE MISUSE OF MOTIONS TO DISQUALIFY DEFENSE COUNSEL.

The petitioner failed to brief below the issue of harmlessness of the deprivation of counsel of choice which it now presents as a secondary claim for review. The state cited *Flanagan v. United States*, 465 U.S. 259, 104 S.Ct. 1051, 79 L. Ed. 2d 288 (1984), in its Connecticut Supreme Court brief, at 11, for another proposition. While this Court has not

definitively ruled on whether denial of defendant's counsel of choice requires a showing of prejudice for reversal, the *Flanagan* case has provided guidance on the issue to the lower courts. The petitioner now magnifies the dimensions of the controversy in the lower courts in order to obtain further review.

In *Flanagan*, this Court noted that "to the extent that an asserted right to counsel of choice is like, for example, the Sixth Amendment right to represent oneself . . . [o]btaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." 465 U.S. at 267-68. The Court explained that "[n]o showing of prejudice need be made to obtain reversal in these circumstances because prejudice to the defendant is presumed." 465 U.S. at 268.

Given the concern that an unscrupulous or overzealous prosecutor might call defense counsel as a witness unnecessarily, or "'manufacture' a conflict in order to prevent a defendant from having a particularly able defense counsel at his side," *Wheat*, 486 U.S. at 163, it would be unfair and unwise to permit the state to argue that defendant's replacement counsel was adequate, or worse, to have the defendant shoulder the burden of showing inadequacy. Such inquiries regarding the ineffectiveness of counsel are better left to habeas corpus proceedings.

The majority of circuits that have reached the issue have held that a party need not demonstrate prejudice in seeking to obtain reversal based on an erroneous denial of the right to counsel of choice. *See United States v. Panzardi Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987) (relying on *Flanagan*); *United States v. Rankin*, 779 F. 2d 956, 960 (3rd Cir. 1986) (relying on *Flanagan*); *Wilson v. Mintzes*, 761 F.2d

275, 285-86 (6th Cir. 1985); *Crandell v. Bunnell*, 144 F.3d 1213, 1216 (9th Cir. 1998), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000); *United States v. Childress*, 58 F.3d 693, 736 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1098 (1996); *cf. United States v. Mendoza-Salgado*, 964 F.2d 993, 1016 (10th Cir. 1992) (explaining that defendant need not show prejudice when trial courts interference with right to counsel of choice unreasonable or arbitrary); *see generally Johnstone v. Kelly*, 808 F.2d 214, 217 (2d Cir. 1986) (characterizing the language in *Flanagan*, 465 U.S. at 267-68, as strongly suggesting that denial of the Sixth Amendment right to self-representation can never be harmless error).

The petitioner relies on cases involving factual scenarios unrelated to the present matter, such as *United States v. Turk*, 870 F.2d 1304, 1307-8 (7th Cir. 1989), where a continuance to obtain other counsel was denied. A requirement that harm be shown from that sort of denial of counsel of choice may not be unreasonable, given some defendants' penchant for manufacturing delay. The courts' interest in calendar control is substantial. The dicta in *United States v. Santos*, 201 F.3d 953, 958-61 (7th Cir. 2000), similarly involved a continuance, not a motion to disqualify defense counsel generated by his adversary.

The state also cites *Lainfiesta v. Artuz*, 253 F.3d 151, 156-158 (2d Cir. 2001), *cert. denied sub nom. Lainfiesta v. Greiner*, 535 U.S. 1019 (2002), but that case involved the comparatively minimal deprivation by the trial court of the right of one of two defense lawyers to conduct a particular cross-examination.

Here, the state's own dubious actions led to the Sixth Amendment deprivation. The petitioner shifted from one insubstantial ground to another for disqualifying Attorney Mastronardi, a highly-regarded criminal defense lawyer, as the

time for trial drew near. The potential for a conflict of interest was remote. Attorney Mastronardi was not called as a witness in the Snead trial. The state pursued a different theory of the case at the Clarke/Brown trial. Attorney Mastronardi was not necessary there either. Had the state presented an adequate offer of proof as it did in *Ullmann* to demonstrate a real need for defense counsel's testimony, and had the trial court not acted arbitrarily at the state's behest without a fully-developed record, *see United States v. Voigt*, 89 F.3d 1050, 1074 (3d Cir.), *cert. denied*, 519 U.S. 1047 (1996), this case would be in an entirely different posture.

The issue which the state seeks to raise was most squarely addressed in *State v. Arguelles*, 63 P. 3d 731, 756 n. 23 (Utah 2003). There, however, the defendant sought the death penalty for himself. The appellate court held that the trial court's failure to consider the defendant's waiver of a conflict of interest was harmless, since the defendant would not have permitted the disqualified lawyer to present a defense in any event. In addition, the connection of the disqualified attorney to the matters to be tried was well-established. *Arguelles* does not demonstrate a widespread legal controversy crying for this Court's intervention.

In urging the adoption of a harmlessness test, the petitioner treats all defense counsel as essentially fungible. The respondent, who received a sentence of 105 years, does not see it that way. The misguided claim which the state advances so importunately now was one that it failed to brief below. Outside of dicta and inapposite factual scenarios, no significant difference of opinion exists in the lower courts.

The petitioner simply has not presented a strong rationale for revisiting the question of harm after *Flanagan*. A lesser standard will not adequately protect the Sixth Amendment right to counsel of choice against the temptation for prosecutors unnecessarily to call defense counsel as

witnesses. Even if the deprivation of counsel of choice is not viewed as "structural error" in all circumstances, the application of a harmless error test in situations like the present case would place an unfair burden on defendants and create a dangerous strategic incentive for prosecutors.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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February 2004